STRAITS SETTLEMENTS.

[PRIVY COUNCIL]

LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN, SIR LANCELOT SANDERSON.

July 13, 1933.

THE BATU PAHAT BANK, LTD.... Appellants

vs.

THE OFFICIAL ASSIGNEE OF THE PROPERTY OF TAN KENG TIN, A BANKRUPT } Respondent

[SINGAPORE BANKRUPTCIES Nos. 285 of 1929 and 347 of 1930 CONSOLIDATED. SINGAPORE CIVIL APPEAL No. 9 of 1932. PRIVY COUNCIL APPEAL No. 91 of 1932]

Ordinance No. 155 (Companies) Section 111 (3)—Banking Company's lien over its own shares.

Section 111 (3) of Ordinance No. 155 (Companies) provides that no banking company shall lend any part of its funds on the security of its own shares. A shareholder of the Appellants, the Batu Pahat Bank, Limited, holding fully paid up shares had obtained in 1921 an advance from the Bank of about $10,000.

By article 29 of its original Articles of Association the Bank was given a lien on all the shares (not fully paid up) registered in the name of each member for all the member's obligations to the Bank. After the enactment in the year 1923 of Section 111 (3) of Ordinance No. 155 (Companies) the Bank by Special Resolution amended its Article 29 so as to give itself a lien over its fully paid up shares also by deletion of the words "not fully paid up." The shareholder having been adjudged bankrupt, the Official Assignee claimed the shares to be "part of his property." The Bank claimed a lien.

Held on appeal to the Privy Council (a) That Section 111 of Ordinance No. 155 does not invalidate a security given in contravention of sub-section (3) thereof (b) That the Bank's Article of Association No. 29 as amended was not *ultra vires* (c) That continuing an existing loan to a customer of money previously lent was not a loan of the company's funds within the meaning of Section 111 (3) of the Ordinance and (d) That the Bank had a valid lien on the shares.

Allen v. *Gold Reefs of West Africa*, (1900) 1 Ch. 656 followed.

The decision of Terrell, J., and that of the Court of Appeal reported in 1 Mal. L.J. 134 reversed.

The finding of the dissenting Judge in the Court of Appeal, Whitley, J., upheld.

An appeal to the Privy Council from the decision of the Court of Appeal, Straits Settlements, which is reported in 1 Mal. L.J. 134.

Sir Gerald Hurst, K.C. (*C. D. Ryles* with him) for the Appellants.

St. John Micklethwait, K.C. (*A. W. Cockburn* with him) for the Respondent.

Cur. Ad.. Vult.

The judgment of their Lordships of the Privy Council (Lord Blanesburgh, Lord Russell of Killowen, and Sir Lancelot Sanderson) was delivered by—

LORD RUSSELL OF KILLOWEN.—The question for decision on this appeal is whether the appellants (who are a banking company limited by shares) are entitled to a lien on 110 fully paid shares in that company registered in the name of one Tan Keng Tin.

The company was registered in Singapore on the 20th August, 1919, under the Companies Ordinance, 1915, of the Straits Settlements. Tan Keng Tin was one of the original shareholders, having subscribed and paid in cash for 110 fully paid shares of $100 each.

The articles of association of the company contained the following provisions:—

> "5. No part of the funds of the company shall be employed by the directors or the company in the purchase of or lent on the company's shares.
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> "29. The company shall have a first and paramount lien upon all the shares (not fully paid up) registered in the name of each member (whether solely or jointly with others) for all calls upon such shares and also for all debts, obligations, engagements and liabilities of such member solely or jointly with any other person to or with the company whether the period for the payment, fulfilment or discharge thereof shall have actually arrived or not.
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> "30. For the purpose of enforcing such lien the directors may sell the shares subject thereto to any number but no sale shall be made until the time for such payment, fulfilment or discharge as aforesaid shall have arrived, and notice in writing of the intention to sell shall have been served on such member holding the shares or his representatives and default shall have been made by him or them in payment, fulfilment or discharge of such debt, liabilities or engagements within fourteen days after such notice."

In 1921 Tan Keng Tin, who was a customer of the bank obtained a loan from the company of $10,000. The evidence as regards this transaction, and indeed, as regards the whole case, is meagre. The transaction is referred to as the obtaining of an overdraft for $10,000, which was reduced later to $9,000. At the inception of the loan Tan Keng Tin signed some document, of which there are no particulars. At a later date (viz., December, 1928) at the request of the bank, who represented that the original document "was affected by effluxion of time," he signed a promissory note for $9,000, being apparently the amount then due. This document was, for some unexplained reason, signed by him both in his own name and in the name of a business firm of which he was the sole member, and which had ceased to carry on business. From these facts it would appear that the transaction was an immediate advance in 1921 by the bank of $10,000 on loan account (subsequently paid off to the extent of $1,000), and not an overdraft in the ordinary sense of a current account overdrawn to varying amounts from day to day.

In the year 1923 the law relating to banking companies and certain other companies was amended by inserting a new provision into section 111 of the Ordinance No. 155 (Companies) (formerly section 108), and by altering the wording in other respects.

The amended section runs thus, the new provision being sub-section three:—

Banking and certain other companies.

"111.—(1) No loan shall be made by any banking or insurance company or by any deposit, provident or benefit society to any director or officer of such company or society or to any firm of which any director or officer of such company or society is a partner, except upon securities in which a trustee may invest under the powers of Ordinance No. 144 (Trustees) and the value of which exceeds the amount lent by 30 per centum.

"(2) A list containing the amounts lent every month under sub-section (1) and the names of the directors or officers to whom such loans have been made together with the amounts previously lent which have not been repaid shall be prepared, and a copy thereof shall on or before the first Monday in every succeeding month be sent to the Registrar.

"(3) No such company as aforesaid shall lend any part of its funds upon the security of its shares.

"(4) If any loan is made in contravention of this section, any director or manager of the Company or society shall be liable to a fine not exceeding $1,000, and shall also be liable for the payment of any portion of the amount lent which remains unpaid after deducting the amount realized on the securities.

"(5) If default is made in complying with sub-section (2) any director or manager of the company or society shall be liable to a fine not exceeding $50 for every day during which the default continues.

"(6) For the purpose of this ordinance a company which carries on the business of insurance in common with any other business or businesses shall be deemed to be an insurance company."

In the year 1927 the 29th article of association of the bank was amended by striking out the words in brackets, viz., "not fully paid up."

On the 4th October, 1929, Tan Keng Tin was adjudicated bankrupt. A dispute then arose between the bank and the official assignee, the former claiming a lien on the shares, the latter disputing the claim, with the result that the official assignee took out a summons in the bankruptcy by which he claimed that the 110 shares were "part of the property of the bankrupt." The true question for decision, however, was, and was correctly stated in the evidence to be, "has the bank a valid lien on these shares?"

On the hearing of the summons Terrell, J., made an order declaring that the bank had no valid lien on the shares. On appeal the Court of Appeal of the Supreme Court of the Straits Settlements dismissed the appeal (Whitley, J., dissenting).

Terrell, J., held that no money had been advanced to Tan Keng Tin on the security of his shares, but that the effect of section 111 (3) of the ordinance was to invalidate any security for a loan by the company purported to be created on the company's shares and to render article 29 of the bank's articles of association *pro tanto ultra vires*; with the result that no lien attached.

On the appeal Murison, C.J., and Burton, J., seem to have agreed in substance with this view. On the other hand Whitley, J., was of opinion that section 111 did not invalidate a security given in contravention of section 111 (3), and that accordingly article 29 was not *ultra vires*.

Their Lordships agree with the conclusion of Whitley, J., and are of opinion that the bank have a valid lien on the shares.

In 1921 the bank lent $10,000 of its funds to Tan Keng Tin. This money was not lent upon his shares, because (even assuming that a lien attaching under article 29 at the moment of a loan by the company, would make that loan a loan on the company's shares within the meaning of article 5), no lien did attach at the moment of this loan because the shares were fully paid shares.

The alteration of the articles in the year 1927 would (apart from the effect of section 111 (3) of the Companies Ordinance) operate to create an effective lien on the shares in favour of the bank (*Allen* v. *Gold Reefs*, [1900] 1 Ch. 656). There is nothing in article 5 to prevent this, for the funds had already been lent in 1921; and their Lordships are unable to find any grounds upon which it can be said that there was any loan of the company's funds to Tan Keng Tin on any later date.

The question then arises whether section 111 (3) of the Companies Ordinance operates to invalidate the security or whether it merely prohibits the making of a loan on security under pain of incurring the specified penalties and liabilities. The answer to this question, which is the crucial question in the case, depends upon the true construction of the language used in the section, and this, in their Lordships' opinion, is, by sub-section 4, made reasonably clear. Sub-section 4 deals in terms with the case of "any loan.....made in contravention of this section." It was argued that this sub-section only refers to a loan made in contravention of sub-section 1; and that the words "the securities" refer only to the securities for a loan within sub-section 1. Their Lordships cannot so hold, without giving to the words used a meaning which they simply do not bear. Sub-section 5 shows that the legislative power when it desired to do so, did in terms refer to the infringement of a particular sub-section. Their Lordships can do no other than say that sub-section 4 means what it says, and that it deals with *any* loan made in contravention of the *section*, including, therefore, a loan by a

banking company of part of its funds upon the security of its shares. If that event happens sub-section 4 specifies the consequences, and they include a personal liability on directors and managers for "the payment of any portion of the amount lent which remains unpaid after deducting the amount realized on the securities." This is a recognition by the sub-section of two things, viz. (1) the continuance of the security on which the loan was made and (2) the discharge of the debt *pro tanto* by the proceeds of its realization. In the face of this it seems to their Lordships impossible to say that section 111 (3) operates to invalidate a lien which would, apart from that sub-section, be an effective lien.

For these reasons their Lordships are of opinion that the appeal should succeed, that the orders of Terrell, J., and of the Court of Appeal should be set aside, and an order made declaring that the bank have a valid lien on the 110 fully paid shares for the principal and interest due to them in respect of the loan. The appellants must have their costs here and below, which in the event of any insufficiency of the bankrupt's estate can be added to their security. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for the Appellants—*Peacock and Goddard*, London; *Braddell Brothers*, Singapore.

Solicitors for the Respondent—*Baileys, Shaw and Gillett*, London.

[ORIGINAL CIVIL JURISDICTION]

[APPELLATE JURISDICTION]

MILLS, J.

March 2, 1933.

TERRELL, COBBETT and WILLIAMSON, JJ.

June 23, 1933.

MUTTIAH.....Plaintiff (Appellant)

vs.

CHANG KIAM HO.....Defendant (Respondent)

[SINGAPORE SUIT No. 338 of 1932]

[*IN FORMA PAUPERIS* APPEAL No. 7 of 1933]

Foreign Judgment, action on—F.M.S. Labour Code, 1923 — Order of Deputy Controller of Labour.

An order of the Deputy Controller of Labour, Ipoh, under S. 98 of the F.M.S. Labour Code, 1923, is not a final and conclusive order productive of a *res judicata* between the parties thereto and therefore cannot be sued on in the Courts of the Colony as on a foreign judgment.

Action.

On the 28th February, 1930, the Deputy Controller of Labour at Ipoh made an order under S. 98 of the F.M.S. Labour Code, 1923, ordering the Defendant to pay to the Plaintiff the sum of $867.20.

The Plaintiff sued the Defendant on that order by specially endorsed writ. The Defendant filed a Defence denying all indebtedness, denying the order, and averring that if such order was made (which was denied) it was not enforceable against the Defendant. He also set up other pleas in defence.

Menon for the Plaintiff.

Mallal for the Defendant.

MILLS, J.—The Plaintiff in this case sues on an order made on the 28th of February, 1930, by the Deputy Controller of Labour at Ipoh, ordering the defendant to pay the sum of $867.20 to the Plaintiff.

Halsbury (2nd Edition, Vol. 6, p. 324) states the law as follows:—"The judgment *in personam* of a foreign Court of competent jurisdiction condemning one of the parties to the payment of a sum of money constitutes a good cause of action in England;" the judgment is regarded as creating a debt between the parties to it, the liability of the defendant arising on an implied contract to pay the amount stated to be due.

The defendant admitted that the order had been made as alleged by the plaintiff, but he raised four defences to the action.

First, he contended that the order was not a final and conclusive judgment of a foreign Court.

I hold that the tribunal constituted by the Controller of Labour is not a Court: first, it is not designated or described as a Court in the Enactment which establishes it: secondly, it is not a Court for all purposes; for instance, the Federated Malay States Court of Appeal has held that it is not a Court within the meaning of the Civil Procedure Code (*Chhin Sin Choy* v. *Chin Kee and others*, F.M.S. Law Reports Vol. IV, p. 3): thirdly, it lacks certain of the qualities which ordinarily characterize a Court; for instance its procedure differs materially from the procedure prescribed for a Court under the Procedure Code; again, the Controller has no power to administer an oath; again the Controller holds his enquiries in private.

Further I hold that the Controller's decision is not a final and conclusive judgment; this is clear from Section 217 of the Labour Code which enacts that an employer or labourer may enforce his civil rights and remedies by a suit in Court, in any case in which proceedings are not proceeded with to judgment and satisfaction under the Labour Code.

Secondly, the defendant contended that the proceedings before the Controller were irregular because no complaint was made to the Controller by the Tamil labourers. I hold against that contention for three reasons: first, the English